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January 4, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Reference: MM Docket No. 92-250
[Broadcast Signal Carriage Issues]

Dear Ms. Searcy:

We submit herewith an original and five (5) copies of the comments of the Community Broadcasters Association in the above referenced rule making proceeding.

If there are any questions in regard to this matter, kindly communicate directly with this office.

Respectfully submitted,

COMMUNITY BROADCASTERS ASSOCIATION

By _____
Henry A. Solomon
Its Attorney

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

To: The Commission

COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION

The Community Broadcasters Association ("CBA"), by its attorneys, respectfully files its comments in the above-entitled proceeding. In support hereof the following is shown:

I. IDENTITY AND INTEREST

CBA is an association of more than 110 low power television licensees and permittees, including stations which will be affected by the LPTV must-carry requirements in Section 4 of the Cable Television Consumer Protection Act of 1992. CBA participated in the House and Senate proceedings leading up to the adoption of the 1992 Act and, specifically, in the formulation of Sections 614(a) and (h)(2).[1] CBA hopes these comments will assist the Commission in adopting regulations effectuating Congress' determination that cable carriage of certain LPTV stations is in the public interest and therefore should be encouraged.

[1]CBA also moved to intervene as a defendant in the U.S. District Court litigation involving challenges to the constitutionality of Sections 4 and 5 of the 1992 Act and has been granted leave to participate as *amicus curiae*.

II. COMMENTS

A. Scope

CBA's Comments will principally address matters contained in Section III, B and C of the Notice of Proposed Rule Making (FCC 92-499), adopted November 19, 1992 (the "NPRM").

B. The Commission Should Enact General Rules Upon Which LPTV Stations and Others May Rely in Determining Eligibility for Cable Carriage

The baseline question raised by the Commission at paragraph 29 of the NPRM is whether a case-by-case review of the operations of individual LPTV stations is required to determine whether they qualify for must-carry rights or whether general rules can be relied on. General rules are clearly appropriate. A case-by-case approach would frustrate congressional intent to promote and encourage LPTV carriage in small communities and rural areas and would contravene the public interest by unduly delaying cable subscribers' access to LPTV programming. Additionally, it would defeat the interests of LPTV licensees who, for the past decade, have striven to gain carriage rights: a case-by-case approach would invariably delay (perhaps significantly) LPTV stations' access to cable. Finally, from an administrative standpoint, a case-by-case approach is potentially wasteful of the Commission's scarce resources which can be allocated to other aspects of cable regulation such as rate practices and other consumer issues. General rules effectuating Section 4 requirements relating to low power television stations should thus be enacted with the appropriate clarification suggested in these Comments.

At paragraph 29 of the NPRM, the Commission also asks:

> What factors should determine whether a full power station is local? Should we use the market-based definition set forth in Section 614(h)(1)? Should a specific mileage limit be established? Should the limit be based on county or state boundaries?

CBA submits that the standard should not be the ADI-wide standard of Section 614(h)(1). As recognized in the NPRM, each County is assigned to a single ADI by Arbitron, and each ADI has at least one television licensed to it. If this definition is adopted for purposes of the low power carriage rules, every single county in the country will have a "local" station, thus defeating the purpose of the carriage rules for LPTV stations. Instead, CBA submits that for purposes of determining carriage of LPTV stations, a full power station should be considered "local" only if it meets the requirements below:

1) It is in the same state as the cable system on which the LPTV station seeks carriage; and

2) It is within 35 miles of the cable system's headend.

CBA has many members who program in "border towns" which are served by large market stations licensed to another state. These LPTV stations can provide critical state news to their community which is largely ignored by the major market station, since the majority of viewers live in another state. Similarly, for years the Commission concluded that 35 mile zones were appropriate, because stations traditionally have not sought advertising or dedicated resources to cover local news and activities beyond such zones. This is the main reason Congress, for the first time, has granted must-carry status for some LPTV stations. These rights should not be eviscerated by huge geographic markets or even large theoretical contours, when the fact of the matter is that local programming for the outlying areas just is not being broadcast from within the heart of the market.

C. Whether a Low Power Station is Fulfilling Community Needs is a Matter to Be Determined In the Face of A Refusal to Carry: There is no Need for a Rule for the Evaluation of Programming Efforts

CBA submits that the Commission's interpretation of Section 614(h)(2)(B), as set forth at the end of paragraph 29 of the NPRM, is correct. The Commission "tentatively interpret[s] the 1992 Act to require that the Commission make a determination regarding fulfillment of community needs only if an LPTV station asserts must-carry rights against a cable operator and is refused carriage." *Id.* As CBA has pointed out, case-by-case determinations concerning carriage qualifications criteria is unwieldy.

Nothing in the Act suggests that Congress intended LPTV stations to prove a negative *ab initio* -- that area full power stations are not fulfilling community needs -- as a condition precedent to cable access. Moreover, the Commission is fully justified in interpreting the LPTV carriage provision as not saddling *it* with the burden of making a qualitative assessment in the first instance *and* in the absence of a controversy; *i.e.*, a cable operator's refusal to carry and its contentions in support of that position.

The Commission also seeks comments on criteria which might assist it in determining whether a challenged low power licensee is indeed serving community needs through its local programming efforts. CBA urges the Commission to avoid overly specific rules, but to consider each case on its merits based on facts presented by the parties. Thus an LPTV station broadcasting predominately in a foreign language and a station in a resort area broadcasting information of interest to tourists and visitors, may be fulfilling the needs of their respective communities equally effectively. In short, the guidelines set forth in Section 614(h)(2)(b) should be carried over in

implementing regulations, but more specificity does not appear either necessary or appropriate.[2]

D. The Commission Should Define The Term "Over-The-Air Signal of Good Quality"

In Section 614(h)(2)(D) Congress deferred to the Commission with respect to the determination of what constitutes an "over-the-air signal of good quality." A "good quality" signal must be delivered by the LPTV station to the cable system's headend in order for the station to qualify for must-carry. CBA recommends that the Commission rule implementing Section 614(h)(2) (Qualified Low Power Station), specifically paragraph (h)(2)(D), provide as follows: *For purposes of this section an over-the-air signal of good quality shall mean a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment or a baseband video signal.*

The Commission notes that at paragraph 33 of the NPRM that the various statutory definitions of signal quality differ slightly between the services discussed (*e.g.*, full power commercial stations, NCE stations, and low power stations). It suggests there, and elsewhere,[3] that adopting consistent technical standards between the services would be consistent with congressional intent and ease the Commission's implementation burdens even if the statutory language differs slightly.

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[2]At §2(a)(21) of the Act, Congress eschews any hard and fast definitions, stating only that the low power station seeking carriage must create and broadcast "as a substantial part of its programming day, local programming."

[3] *See e.g.*, NPRM, ¶39, where the Commission notes that although the remedy provisions of §614(d)(1) do not explicitly appear to apply to LPTV stations, it would be wholly consistent with the statute, and least burdensome, if the Commission applied through regulation the remedy provisions of §614(d)(1) to LPTVs.

The language CBA suggests generally tracks the definition in Section 614(h)(B)(iii) applicable to full power television stations, thereby ensuring that cable operators will be provided with a signal of a quality identical to that delivered to them by full power must-carry proponents. Thus it is hoped that the prospect of technical disputes between cable operators and LPTV carriage proponents will be, if not eliminated, minimized.

E. Displacement of LPTV Must-Carry Stations is Not Required by the Statute and is Not Consistent with Prior FCC Policies

At paragraph 29 of the NPRM, the Commission off-handedly concludes that the emergence of a new television station within the same county as an LPTV station would automatically require a cable system to discontinue carriage of the LPTV station and to substitute the new full power signal. Such a conclusion is not mandated by the Statute, however, and conflicts with a long history of Commission policy aimed at minimizing the disruption to cable subscribers resulting from changed regulatory or market conditions. Section 614(a) only refers to qualifying low power television stations for carriage, not to disqualifying them. There is nothing in the statute that explicitly requires a cable system to remove a must-carry LPTV signal upon the emergence of a full power station within the same county. Therefore, CBA submits that the emergence of a new full power television station should not act to truncate automatically the must-carry rights of LPTV stations that have already demonstrated that they are fulfilling local programming needs and thus serving the public interest.

The approach CBA recommends is completely consistent with the long history of FCC cable regulation. In 1972, in its landmark *Cable Report and Order*, 36 FCC 2d 142 (1972), the Commission adopted its most radical changes to cable regulation, including expanding its must-carry jurisdiction

and adopting market quota rules for importing distant signals. In so doing, the Commission noted that future changes in both market and regulatory structures could act to deprive cable subscribers of signals to which they had become accustomed. Specifically addressing what would happen if a new television station were to come on the air creating a new television market and thus subjecting cable systems to market quota rules for the first time, the Commission clearly stated that the "emergence of new stations will not require displacement of existing signals because that would cause disruption to the public," 36 FCC 2d at 172 (1972).

Moreover, in *Cable System Carriage of TV Signals*, 41 RR 2d 121 (1977), the Commission amended the equations used in determining the Grade B contour of television stations such that the predicted contours of UHF stations were shrunk. Faced with the possibility of having to redefine numerous stations as distant because the new predicted contours would not cover numerous cable systems, the FCC refused to do so, adopting what it called a "two-way street grandfathering" approach.

> While grandfathering is traditionally a permissive concept which allows the status quo to remain rather than requiring it to, we feel it is in the public interest to mandate continued carriage in this context. Therefore the rules will be amended to provide that where a cable system is located in the area between a station's prior predicted Grade B contour and its new one, and is presently required to carry that signal by virtue of that contour's location, *the rights of the cable system to continue its carriage and the rights of the station to demand continued carriage shall remain in force.*

41 RR 2d at 127 (emphasis added).

All of these cases point to a clear understanding of the importance of continuity in must-carry rights and to the Commission's implicit recognition that deleting signals is potentially disruptive and thus should be avoided wherever possible. The same approach should be applied to LPTV stations. If an LPTV station gains must-carry rights, it should not be disqualified automatically and instantly by a new full power station going on the air in the same county. Rather, having met the highest burden ever placed on a television station to acquire must-carry status, by virtue of the statutory requirement that it fulfill local needs for news and informational programming -- a burden not imposed on full power stations -- CBA submits that the LPTV station's must-carry rights should remain in effect.[4] The only instance in a LPTV station's loss of must-carry rights would be consistent with the 1992 Act is where carriage of the new full power station could only be accomplished by displacing a LPTV occupying the last available channel. In such a case, the LPTV station would have to be displaced because of Section 614(b)(2)(A) (cable system cannot carry an LPTV station in lieu of a full power station).[5]

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[4] New full power stations licensed to the same county as the LPTV stations would be well aware of the must-carry rights of the LPTV prior to activating their station, and thus would be able to take this into account. *See Third Report and Order in MM Docket 87-268 (Advanced Television Proceeding)*, FCC 92-438, released October 16, 1992, ¶ 8, n.10 (full power applications filed after October 24, 1991 not given opportunity for new ATV channel; such applicants are on notice of their potential disadvantage and should plan accordingly).

[5] Should the Commission disagree with CBA's above-stated position, it should, at a mimimum, recognize incumbent LPTV stations as full parties in interest in any proceedings involving proposals to expand a broadcast station's market brought under §614(h)(i)(C)(III).

F. The Commission Should Require Cable Operators to Provide Reasonable Notifications to LPTV Stations and to Cable Subscribers in Discontinuance Situations

1. Notice to LPTV Station.

If the Commission decides to abandon its prior reasoned approach to signal disruption, CBA urges that at the least the Commission work to minimize this disruption by affording all parties, and the public, the opportunity to make necessary adjustments *before* a LPTV signal is deleted from the cable system.

CBA suggests that the notification period be 120 days. Further, the full power television station seeking carriage and ultimately LPTV displacement, should be required to coordinate its timetable for access to the cable system with the cable operator. A generous notice period will give the affected LPTV licensee time to negotiate for alternate signal distribution such as Section 612 carriage on a leased access channel or to arrange for placement of its signal on an unused PEG channel, and to evaluate fully its existing and planned contracts with advertisers and programmers. As an example, CBA members who have been able to gain carriage pursuant to Section 612 of the 1984 Cable Act find themselves reaching agreements in principle with local system managers rather expeditiously, only to encounter delays in finalizing the contracts where system are owned by MSOs. Gaining the approval of franchising bodies for PEG channel carriage may also be time-consuming. An LPTV station that is deprived of cable carriage even on a temporary basis pending finalization of a leased access arrangement, is likely to suffer severe economic injury. More fundamentally, the public's interest in assuring uninterrupted reception of locally-oriented programming is, standing alone, a persuasive ground in favor of a more expansive notice period.

2. Cable Subscriber Notice. The NPRM asks whether cable operators should also be required to notify their subscribers of the proposed LPTV carriage discontinuance. Cable operators should definitely be required to notify their subscribers. Notification is not burdensome in light of the limited number of possible LPTV must-carries. Moreover, notification is appropriate because it informs cable subscribers either that they will no longer have access to an alternative locally-oriented program source or that they may be able to continue receiving such programming but on a different channel. Where, for example, the cable operator and the LPTV station do not reach an agreement for alternate carriage, cable subscribers will at least be made aware that in order to continue viewing the LPTV station they may have to install or reconnect rooftop antennae. Where the cable operator bills subscribers monthly, a notice accompanying regular statements should be sufficient. Otherwise, a separate 30-day advance mailing by the cable operator is appropriate.[6]

G. Appropriate Remedies are Already Available To Redress Situations in Which Operators Refuse to Honor LPTV Stations' Carriage Requests

In Section III, C of the NPRM the Commission considers remedies available to commercial television stations and NCEs for cable noncompliance with carriage and other Section 614 requirements. Under Section 614(d)(1) of the Act, commercial broadcasters must, after initiating a notification process vis-a-vis cable operators who fail to meet carriage obligations, seek Commission redress by filing a complaint. The Commission points out in note

[6] CBA submits that similar regulation should be adopted concerning the notification requirement for signals not available without an up-converter box. *NPRM*, ¶16. Non-carried LPTV stations can be added to the list cable systems provide subscribers with little additional burden.

48 that (d)(1) does not explicitly provide for LPTV stations. The Commission then expresses the belief that "it would be appropriate for LPTV stations entitled to carriage to be accorded the same rights as other commercial must-carry signals in this regard"

The 1992 Act does not identify remedial procedures which may be invoked by LPTV stations in the face of cable operator refusals to carry. Absent specific remedial provisions in the Act,[7] it appears clear to CBA that Section 76.7 (Special relief) would govern LPTV carriage disputes and would protect the rights of LPTV stations and cable operators. Under (c)(1) of the rule, a cable operator declining an LPTV station's carriage request would seek a ruling as to the applicability of the must-carry provision. That initial burden should be shouldered by the cable operator contending that the statute is inapplicable. CBA believes such was Congress' intent in limiting the Section 614(d)(1) complaint process to cases involving "local commercial television stations." Section 614(d)(1) thus envisions the resolution of carriage-type disputes utilizing summary procedures. This is because, CBA submits, substantive determinations under provisions governing the carriage of commercial television stations are more susceptible to prompt resolution by reference to objectively provable facts such as market statistics and cable system operational data. By contrast, the carriage criterion most likely to be litigated by cable operators -- fulfillment of community needs through local programming -- will generally involve a searching factual analysis and is thus better suited to the more rigorous pleading requirements embodied in Section 76.7(c)(1).

[7]Title V of the Act, of course, specifies forfeitures for cable television operators and others who violate provisions of the Act, and CBA agrees with the NPRM's determination at note 50 that the 1992 Act does not foreclose broadcasters from suing cable operators in state and federal courts in appropriate cases.

CBA agrees with the Commission's suggestion at NPRM paragraph 40 that it may be appropriate to modify the time limits in Section 76.7. CBA recommends shortening pleading time limits and imposing a Commission action date. Specifically, CBA proposes that Section 76.7 be modified to provide that cable operators file any petitions within 30 days after *service* of a written notification by the LPTV station, that oppositions be filed within 10 days thereafter, replies within 5 days of the opposition, and that the Commission make its determination within 120 days of the initial petition. The rule should also provide that (i) if a timely special relief request is not filed, the cable system must promptly begin carrying the LPTV station and cannot discontinue carriage until it prevails in a final decision, and (ii) a cable operator petitioning to discontinue carriage of an LPTV station must maintain the *status quo* until there is a final decision.[8]

H. Recognition Under Part 74 of the Rules of Two Classes of LPTV Stations is Appropriate, but Must-Carry Status Should Not Be Considered as Creating a Separate Classification

At note 39 the NPRM asks whether it may be appropriate to change Part 74 which governs the licensing and operation of LPTV stations now that some LPTV stations have gained must-carry rights. In comments (RM-7773) CBA has proposed that two classes of LPTV licensees be created and that different Part 74 regulatory treatment be accorded to each class. CBA submits that the distinction drawn between licensees for classification purposes should not rest on eligibility for must-carry. Instead, the determinant should be whether a station adheres to Part 73 regarding hours of operation, and other pertinent requirements, such as those set forth in Section

[8] CBA also agrees with the Commission's tentative conclusion that the §76.7 procedures are not fee items, since they involve efforts to enforce cognizable rights. *NPRM*, ¶40.

614((h)(2). Thus a particular LPTV station may not be "qualified" (or may no longer be qualified) for cable carriage because of geographic and other factors over which the licensee has no control, but should nevertheless enjoy the same Part 74 regulation as fully qualified stations. CBA therefore urges the Commission to draw the foregoing more meaningful distinction which recognizes that the 1992 Act does not create two classes of LPTV stations, but rather recognizes and gives effect to new rights to be enjoyed by those licensees fortunate enough to operate in smaller communities and in rural areas.

I. The Commission Should Ensure that Legitimately Unused PEG Channels are Made Available for LPTV Carriage

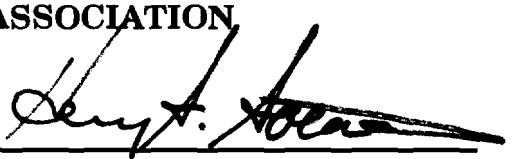
In implementing Section 614(c)(2)(Use of Public, Educational, or Governmental Channels), the Commission should make clear by rule that a PEG station is not "in use" if, during a substantial portion of the day its transmissions simply consist of bulletin-board type messages disseminated by means of a character generator. CBA submits that implicit in the 1984 Act's PEG requirement is the notion of *bona fides,* that at least the predominant use of PEG channels should involve the transmission of video programming generally considered comparable to programming provided by television broadcasting stations.

At paragraph 30 of the NPRM the Commission requests comments on the procedures to be followed where a PEG channel is being used for LPTV station carriage, but a qualified PEG user later materializes leading the franchising authority to withdraw its approval for alternate use. In these situations the Commission's rules should provide for at least 120-day advance notification by the cable system to the affected LPTV station. Moreover, the Commission is respectfully urged to assert a matter of policy that the sharing of PEG channels between qualified public, educational or governmental users,

and qualified LPTV stations is in the public interest. In this way, for example, a PEG eligible who may use the access channel only occasionally (*e.g.*, for city council meetings or ceremonies) may share it with the LPTV licensee, to the benefit of both parties and cable subscribers.

Respectfully submitted,

COMMUNITY BROADCASTERS ASSOCIATION

By 

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